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John L. Smalldon, M. D.  
New Hampshire State Hospital  
104 Pleasant Street  
Concord, N. H.

SEP 03 1998

CONCORD, N.H.

Dear Sir:

You have inquired as to the legal status of the commitment of an insane person to your hospital by commitment papers which are incomplete. The answer to this question depends upon the individual statutory requirement which is missing.

Our Supreme Court in Horne v. Bancroft, 62 N. H. 362 was faced with a comparable situation in an action of trespass for false imprisonment brought by the plaintiff patient against the defendant superintendent of the State Hospital. In this case the commitment papers were signed by two physicians but the certificate acknowledging the signatures of the two physicians was not executed by a judge of the Supreme Court or Court of Probate, mayor or selectman as required by the statute. However, the superintendent was personally familiar with the genuineness of the signatures of the two physicians.

The court ruled that some of the directions in the statute are of the essence of the thing and some are directory merely. When the provision of the statute is the essence of the thing required to be done, it is mandatory; otherwise, when it relates to manner and form. Tested by these rules the court held that the provision for acknowledgment of the signatures was directory only, and if the superintendent had this information from other sources the object of the statute was complete.

With this case as a guide it seems clear that the mandatory part of the statute is the first part of section 18 which is intended for the protection of sane persons. A person must first be adjudicated insane before he can be deprived of his liberty. If the superintendent has the physician's certificate within the proper time, and provided he is familiar with said physicians and their signatures, then the mandatory parts of the statute have been accomplished and the patient may be accepted. The fact that there is no signed request for commitment is another matter which runs to the form used and not to the essence of the thing. The statute provides for commitments to the hospital by a parent, guardian, or friend of an insane person, or the board of selectmen, police or county commissioners subject to section 18. Certainly, two reputable physicians will not of their own volition examine and certify that any individual is insane. Thus form number II may be executed later without voiding the original commitment.

If there are any further questions you may have relative to this subject please feel free to call on me at any time.

Very truly yours,

Arthur E. Bean, Jr.  
Assistant Attorney General

AEB, Jr/T